No. 21689

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] to enforce its order issued against respondent, Harrah's Club, on May 10, 1966. The Board's decision and order (R. 84–86) [2] are reported

[1] The pertinent statutory provisions are reprinted *infra*, pp. 47–50.

[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel or respondent, respectively.

at 158 NLRB No. 76. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Stateline, Nevada, where respondent operates gambling casinos and restaurants.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent is engaged in commerce within the meaning of the Act; that it violated Section 8(a) (3) and (1) by discharging employees Bruce Lovelady and Allan Cole because of their union activities; that it violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting unit employees from receiving gratuities from performers; and that it violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union[3] after its certification by the Board. The facts upon which the Board's findings are based are summarized below.

A. The business of respondent

Respondent, a Nevada corporation with its main offices in Reno, owns and operates restaurants and gambling casinos in Reno and Stateline, Nevada. During its past fiscal year, respondent had purchased and received materials valued in excess of $50,000 directly from outside Nevada; and during the same period respondent sold goods and services at retail in excess of $500,000 valuation (R. 46; GCX(1)g, paragraph

[3] International Alliance of Theatrical Stage Employees & Motion Picture Operators of the United States and Canada, Local 363, AFL–CIO.

I, GCX 1(i)). The largest operation in the Harrah's omplex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, theatre-restaurant which accommodates 700 guests nd features many of the outstanding performers in he entertainment field. This proceeding concerns the tage technicians who build and maintain the scenery, hift it as the requirements of a show demand, op- rate and maintain the lighting, sound and other stage quipment, and generally provide the technical serv- es for stage productions in the South Shore Room.

B. The representation proceedings

On August 14, 1963, the Union filed a petition (des- gnated Case No. 20–RC–5597 by the Board) for a epresentation election among the stage technicians. The respondent and the Union entered into a Stipula- ion for Certification upon Consent Election, wherein he appropriate unit was defined as "All stage tech- icians, apprentice stage technicians and sound con- ole operator in the South Shore Room employed by Harrah's Club at Lake Tahoe; excluding all other mployees, guards and supervisors as defined in the Act" (GCX 2(b)). Pursuant to the stipulation an lection was conducted on October 14, 1963, with 11 tage technicians voting in favor of the Union and ballot challenged. On October 18, respondent filed imely objections to alleged conduct affecting the re- ults of the election. Following an investigation of the isconduct alleged in the objections, the Regional Di- ector, on November 15, 1963, issued his report rec- ommending dismissal of the objections. Respondent

excepted to the recommendation, and on February 27, 1964, the Board issued its Decision and Certification of Representatives adopting the findings and recommendations of the Regional Director, dismissing the objections, and certifying the Union as the exclusive bargaining representative of the unit employees.

C. Respondent's unfair labor practices

1. *Background: Respondent threatens retaliation against the employees because of the advent of the Union*

On September 5, 1963, a conference was held at the Board's Regional Office in San Francisco regarding the Stipulation for Certification upon Consent Election in Case No. 20–RC–5597. Bruce Lovelady, a stage technician in the South Shore Room, attended that conference because he had not made up his mind about the Union and "wanted to find out what was going on" (R. 49; 150 NLRB at 1706, Tr. 56).[4] Harrah's Club was represented by its vice president,

[4] On September 5, 1963, the Union filed an unfair labor practice charge against respondent, designated Case No. 20–CA–2839 by the Board. A hearing held on the charge resulted in the issuance of the Board's Decision and Order, *Harrah's Club*, 150 NLRB 1702 (enforced, 362 F. 2d 425 (C.A. 9), cert. denied, 386 U.S. 915), finding, *inter alia*, that respondent had violated Section 8(a) (3) and (1) of the Act by discharging employee Robert H. Wetherill, and further violated Section 8(a)(1) of the Act by threatening and coercively interrogating employees. In the instant case the Trial Examiner, at the request of counsel for the General Counsel, took judicial notice of the proceedings in Case No. 20–CA–2839 and the facts found therein. When mention is made of such facts herein, we shall refer the Court to the Board's decision in case No. 20–CA–2839, as well as the decision in the instant case.

Rome Andreotti, Director of Industrial Relations Robert Brigham, Producer Arthur Barkow, and attorney Nathan R. Berke (150 NLRB at 1706).

When Lovelady returned to work on the evening of the following day, his supervisor, Stage Manager Sy Lein, remarked, "Well, I guess you know management has written you off their list" (R. 49; Tr. 57, 150 NLRB at 1706). Asked for an explanation, Lein replied, "Well, because you went to the hearing in San Francisco and they have said, well, you are on the Union's side" (*ibid.*). Lovelady pointed out that it was an open hearing and that he had merely gone to see "what was happening" (*ibid.*). Lein said, "I told them that, but they have written you off as being on the Union's side" (*ibid.*).

On September 9, Lein told Lovelady that if the stage technicians "brought the union in at this time," they would have less job security, and "would probably not all be kept on" (R. 49; 150 NLRB at 1706). On the same morning, Donald Rux, another stage technician, was told by Producer Barkow, "Of course, you know the [stage] crew will be cut back because of the union activity" (*ibid.*).

The certification election was held on October 14, 1963. Shortly before the balloting began the Union announced that stage technician Allan Cole would be its "observor" at the election (Tr. 57–58). When Lein heard the announcement he turned to Lovelady and said, "* * * Allan Cole is an observer for the Union. Didn't I tell you he was one of the ringleaders?" (Tr. 58).

On the day following the election several stage technicians were seated at a table in the employees' cafeteria (R. 49; 150 NLRB at 1709). Robert Brigham, respondent's director of industrial relations, approached the group and said, "I have just been made a fool of and I don't like it * * * It may take me six to eight months to get even, but I will" (*ibid.*). Later, as he was leaving the cafeteria, Brigham pointed to another group of stage technicians, stating, "I will get them too" (R. 50; 150 NLRB at 1709).

Shortly thereafter Brigham was told by Vice-President Andreotti that an employee had complained that he (Brigham) had threatened the stage technicians. The following evening Brigham explained to employees Ponts and McNerthney that his remarks had been misunderstood (R. 50; 150 NLRB at 1710). He remarked, "What I said [which] may have been construed as a threat was that the crew would be reduced in the next couple of months and that the next eight to ten months would prove to be highly educational" (R. 50; 150 NLRB at 1711). Brigham added that "he really didn't know how he personally could get even with anybody, but the whole thing would be proven out in the next months to follow, as the crew was cut back from 30 to 40 percent" (R. 50; 150 NLRB at 1711).

The next evening in the cafeteria Brigham found a group of stage technicians at a table (R. 50; 150 NLRB at 1711). Brigham said that he wanted to apologize if he had cursed or threatened them (*ibid.*). One of the employees interrupted, saying,

"You didn't curse us. You threatened us" (*ibid.*). Brigham replied, "If I did not then, I do it [now]. I am a vindictive man, and, believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 percent" (*ibid.*).

On October 16 or 17, 1963, Entertainment Director Robert Vincent inquired of Lovelady, "Are you aware that we would have done anything to have stopped this Union thing" (R. 50; 150 NLRB at 1711–1712). He added that management would have discharged Barkow, Lein, or Jacques Vogt (the chief lighting technician) "like that," snapping his fingers, if necessary to combat the Union (R. 50; 150 NLRB at 1712). Vincent also said that "Mr. Harrah was basically against all unions, that he didn't want any part of this or any other union, that he worked long and hard for his business and had gotten it where it was today and he felt that he had the right to run it and control it the way he wanted it without outside interference" (*ibid.*). Later that day Vincent told stage technician Charles Walker that he (Walker) had been "very foolish" in voting for the Union and that his chances for a position with management were "washed up" (R. 50; 150 NLRB at 1712).

Late in October, Lein remarked to Lovelady, "If we have a show that only needs two * * * or three men, it won't be like in the past where you all stayed on working. That is all we will use and the rest of you will be out of work" (R. 50; 150 NLRB at 1714).

On January 11, 1964, respondent's vice president for public relations, Patrick France, was having lunch

with technician Rux (Tr. 293). During the course of their conversation, France said to Rux:

> This guy Lovelace [sic] * * * he has you bamboozled. He has you saying he is the best man for the job of stage manager * * * [5] Well, time is running out. If you and Dick Ponts [another stage technician] will try to get a new vote for the Union contract, I will take it from there. You and Dick will be the top on the list for the stage manager's job and more money * * *. Do you think in the past before this Union came up you would have gotten two weeks off for watching television?[6] * * * If the Union comes in, you are going to be watched very closely, and one more mistake and you are through * * *. You are going to be married pretty soon, aren't you * * * [t]o one of the girls in the show * * *. Do you know what will happen if I went to George Morrow[7] and told him to get rid of her * * *. Do you think I would hesitate to tell him to get rid of her? [R. 58; Tr. 294–295].

Rux replied, "No, I don't think you would" (Tr. 295). France added, "Think about it. You get together with Dick Ponts and talk about it, and I will take the ball from there," and gave Rux his unlisted home telephone number (R. 58; Tr. 295).

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[5] In November 1963, Sy Lein, the stage manager, was terminated by respondent (R. 57–58; Tr. 1043). Producer Barkow assumed responsibility for Lein's job in addition to his own until a replacement for Lein was found (R. 57; Tr. 1043).

[6] Some time earlier Rux and two other employees had been suspended for two weeks without pay for watching television during a performance by Jack Benny (R. 58).

[7] George Morrow is half owner of Moro-Landis Productions which produces the so-called "production numbers"—the dancing part of South Shore Room shows (Tr. 295–296).

2. *The withdrawal of tokes*[8]

Prior to the advent of the Union, the stage technicians at Harrah's were accustomed to receiving tokes from performers in addition to their regular salary. This was the usual practice at Harrah's, as it is elsewhere in the industry (R. 57; Tr. 77, 141–142, 160–162). Generally, the tokes were handed in envelopes to each of the stage technicians on the closing night of a show by one of the company's supervisors, such as Producer Barkow or Stage Manager Lein (Tr. 164–165, 932–935). The stage technicians each received $300 or more annually in tokes, thus making their receipt a substantial term of employment (R. 57; Tr. 78, 142–144, 162, 1436–1438, GCX 12).

On December 23, 1963, about five weeks after the issuance of the Regional Director's report recommending that respondent's objections to the election be dismissed, respondent posted a notice that tokes could no longer be accepted by the stage crew (R. 46, 57; Tr. 78). Subsequently, early in 1964, the following paragraph was added to respondent's employee handbook, "You and Your Job" (RX 33, pp. 24–25):

> When a service is performed not for a customer but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such serv-

[8] A "toke" is an item of value, usually money, given by an entertainer to supporting individuals—stagehands, wardrobe mistresses or others performing "service" roles (R. 57; Tr. 77).

ice, no toke may be accepted by the employee performing such service.[9]

Following the posting of the notice, Trudy Greimeister, the wardrobe mistress, not in the bargaining unit, went to Robert Vincent and inquired if the notice regarding tokes included her. He told her that it did not, and she has received tokes since that date (R. 52; Tr. 80–81, 187, 936).

3. *Cole and Lovelady are laid off*

Prior to the stage technicians' selection of the Union as their bargaining representative on October 14, 1963, it was respondent's practice to keep them on the payroll all the time, even when the amount of work needed for a particular show required less than a full crew or even when no show at all was being presented (Tr. 54–56, 149–151, 200–201). Respondent used the excess manpower available to perform necessary general maintenance and repair work on the stage and related equipment in the South Shore Room, and employees worked shorter shifts (Tr. 54–56, 150–151).[10] During the pre-election campaign and

[9] The 1963 edition of the handbook, which the 1964 edition replaced, simply contained the following declaration regarding tokes (RX 32, pp. 19–20):

> If you maintain Harrah's high standards of sincere friendliness, you will find that a number of customers will appreciate your attitude to the extent that you will be offered a gratuity, tip or "toke." These are acceptable and we are pleased to see you receive them if offered under the above circumstances.

[10] The same policy existed in other departments as well, to the extent that when work in a department was slow or nonexistent, excess personnel were afforded an opportunity to perform other jobs (R. 56; Tr. 531, 535, 505–506, 598–600). When

just afterwards, however, Company officials warned the stage technicians that the advent of the Union would result in a reduction in the number of stage technicians permanently employed, and that the Company would adopt a policy of calling for extra crewmen only as needed. See pp. 5–7, supra.

a. *The layoff of Allan Cole*

On January 16, 1964,[11] as the 2-week Mickey Rooney show in the South Shore Room was nearing its halfway point, Cole was summoned to Barkow's office (R. 56; Tr. 151–2). There Barkow and Vincent told Cole he was being laid off because he was the lowest in seniority of the stage technicians (R. 56; Tr. 152). Cole inquired whether his work had been unsatisfactory. Barkow and Vincent told him no, that he was being laid off as part of a general reduction in force and would be recalled if needed (R. 56; Tr. 152).

A week later Cole was recalled by Harrah's to help the stage technicians prepare for the forthcoming Eleanor Powell show (R. 56; Tr. 152). He worked only one day, and then was laid off until approximately February 7 (R. 56; Tr. 153). On the latter date Cole was again recalled, working this time for four weeks until his final termination on March 5 (R. 56; Tr. 153–4).

On the occasion of Cole's final layoff, no mention was made regarding the possibility of his being recalled as had happened on the two prior occasions.

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a permanent reduction in force was implemented in a department, personnel were laid off on the basis of seniority only if all other factors—such as experience and ability—were equal (R. 56; Tr. 73, 995–996, 998–999).

[11] All dates hereafter are in 1964 unless otherwise specified.

Respondent, however, offered "spasmodic" work to Cole on May 7, but this offer was rejected by Cole on May 8 (R. 59; Tr. 167; RX 8) as he wanted reinstatement to a steady job (RX 8). Respondent again offered employment to Cole by telegram dated June 11 (R. 59; Tr. 167–8; RX 9). The offer was only for two weeks' work, however, and was rejected by Cole the same day (R. 59; Tr. 168; RX 10). On July 1, respondent sent the following telegram to Cole (R. 59; Tr. 169, RX 11):

> The resignation of Dick Ponts opens full time position on stage crew. Will you report for work by Sunday, July 5th, latest. Please answer via Western Union immediately.

On July 4, Cole declined because it was "impossible to give three days notice to present employer, lease our home here, move furniture and find apartment in July. Thanks for the offer but cannot accept at this time. Would need at least four weeks to prepare" (R. 47, n. 3; Tr. 170, RX 12).

b. *The layoff of Bruce Lovelady*

Bruce Lovelady, who had been made assistant stage manager in early 1963, was the lowest man in seniority next to Cole (R. 57; Tr. 50, 68). On March 5, shortly after his final discharge, Cole told Lovelady what had transpired (Tr. 66). Lovelady, concerned about the ability of the remaining technicians to cope with scenery constructed for the next show, went to see Barkow about the problem (Tr. 66). Lovelady explained the ramifications of Cole's layoff, and asked Barkow if he was sure the stage technicians could handle the work (Tr. 67). Barkow replied, "I don't

know" (Tr. 67). In disbelief Lovelady again said, "You do understand we haven't had any rehearsal time * * * Are you sure we can do it" (Tr. 67). Barkow again said he did not know, and asked Lovelady to step into his office (Tr. 67–68).

Inside the office Barkow said, "Since the question has come up, I might as well inform you that I am laying you off as well * * * This has absolutely nothing to do with your Union activities, it has nothing to do with your job or how well you have been doing your work whatsoever * * * As you know, we are having a Club-wide cutback and since you are the low man in seniority, you are the next man to go." Lovelady was now more puzzled: "Well, Arthur, I don't know how you can do this * * * We haven't had a rehearsal with the scenery * * * The way it is running right now you may need both Allan and I, and maybe in addition two additional men. What are you going to do tomorrow when you have rehearsal and you find out you need more men" (Tr. 68). Barkow replied, "If that is so, I will call you back" (Tr. 68). When asked, "Do you mean you are going to lay us off tonight, hold rehearsal tomorrow and call us back if you need us," Barkow said, "Yes" (Tr. 68). Lovelady was told to finish the work Barkow had assigned him and to do the paperwork on the following day (Tr. 69).

Following his discharge Lovelady received an offer for two weekends' employment at Harrah's (Tr. 82–83). Lovelady rejected the offer shortly thereafter (Tr. 84). Later, on June 21, Lovelady received another offer of employment from Harrah's—for two weeks' work commencing June 23 (R. 59; Tr. 81–82; GCX 5). This offer was also rejected on the follow-

ing day (R. 59; Tr. 84–85; GCX 6). Finally, on June 26, respondent sent Lovelady an offer stating a full-time position had opened and asking him to report for work by June 30 (R. 59; Tr. 86; GCX 7). Lovelady rejected the offer by telegram, which stated, "No mention of unconditional reinstatement or back-pay. The answer is no" (R. 48, n. 5; Tr. 86–7; GCX 8).

4. Respondent's refusal to bargain

On February 29, 1964, the Union requested that respondent bargain collectively pursuant to the Board's certification issued February 27, 1964. Respondent, from and after March 1, 1964, refused to bargain with the Union, claiming that the Board's certification was invalid and that it was improperly denied a hearing on its objections (R. 48, 54; GCX 1(g), paragraphs VII and VII; GCX 1(i)).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that it should assert jurisdiction over respondent (R. 84–85). The Board also concluded that respondent had violated Section 8(a) (3) and (1) of the Act by discharging employees Bruce Lovelady and Allan Cole because of their union activities (R. 84–86). The Board further concluded that respondent violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting members of the stage crew from receiving tokes without bargaining with the employees' lawful representative and in reprisal for their union activities (R. 84–86). Additionally, the Board concluded

that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the employees' statutory representative (R. 84–86).

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their protected rights (R. 85–86). Affirmatively, the Board's order requires respondent to offer full and immediate reinstatement to Cole and Lovelady to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss they may have suffered by reason of respondent's discriminatory conduct;[12] to bargain collectively with the Union upon request as the exclusive bargaining representative of all employees in the unit; to reinstitute the practice of toking for the stage technicians as it existed prior to December 23, 1963, and to make whole all stage technicians for the losses of remuneration caused as a result of the withdrawal of the practice; and to post appropriate notices (R. 85–86).

[12] The Board agreed with the Trial Examiner's finding that respondent's telegraphic offers of reinstatement contained unreasonable reporting dates and that they were not valid offers of reinstatement. The Board rejected the Trial Examiner's conclusion that Cole's and Lovelady's failure to request an extension of the reporting times should be considered as evidence that the proposed dates did not influence their rejections of the offers, because "such a holding places an undue and unwarranted burden upon the discriminatee to make a counter proposal to Respondent's offer" (R. 47, n. 3, R. 48, n. 5, R. 85, n. 1). See *infra*, pp. 34–36.

ARGUMENT

I. The Board properly asserted jurisdiction over respondent

It is settled that the Board has discretionary authority to assert jurisdiction over Harrah's Club. *N.L.R.B.* v. *Harrah's Club,* 362 F. 2d 425, 427 (C.A. 9), cert. denied, 386 U.S. 915.

Following the Board's decision in the instant case, respondent filed a "Motion to Remand to Trial Examiner and Reopen Record," asking leave to adduce evidence "showing that the Board's assertion of jurisdiction over the gaming industry while declining to assert jurisdiction over racetracks is prejudicial to and in violation of the constitutional rights of the owners of the gaming industry" (R. 88). The motion was based upon this Court's decision in *N.L.R.B.* v. *Harrah's Club, supra,* wherein the Court said that to attack successfully the Board's assertion of jurisdiction, "it must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated [citation omitted]." 362 F. 2d at 427. We show below that the Board properly denied respondent's motion.

Respondent's motion is essentially one to adduce new evidence. But respondent has failed to show that it exercised "reasonable diligence to produce the facts at the original trial"—a showing necessary to support its motion. *N.L.R.B.* v. *Southern Bleachery & Print Works, Inc.,* 257 F. 2d 235, 241 (C.A. 4), cert. denied, 359 U.S. 911. Accord: *N.L.R.B.* v. *Carlisle Lumber Co.,* 94 F. 2d 138, 133 (C.A. 9), cert. denied, 304 U.S. 575; *N.L.R.B.* v. *Moss Amber Mfg. Co.,* 264 F. 2d 107,

110 (C.A. 9). Presumably, respondent would assert that it failed to adduce the evidence at the hearing because *N.L.R.B.* v. *Harrah's Club, supra,* was not decided until after the Board's decision in the instant case. It is readily apparent that this fact cannot excuse respondent's failure to come forth with evidence at the hearing. The decision in *N.L.R.B.* v. *Harrah's Club, supra,* does not enunciate a new principle of law. See, e.g., *N.L.R.B.* v. *Gene Compton's Corp.,* 262 F 2d 653, 656 (C.A. 9). Respondent thus knew or should have known at the time of the hearing that it had to adduce pertinent evidence to support its claim of prejudice. The Court's decision in *N.L.R.B. v. Harrah's Club, supra,* therefore, cannot excuse respondent's failure to adduce at the hearing the evidence it seeks to adduce now.

Even if respondent's failure to adduce the evidence at the original hearing be overlooked, we submit that its motion was nevertheless properly denied. It is established beyond question that a motion to adduce additional evidence must state with particularity the evidence which is sought to be introduced, preferably by affidavits of the proposed witnesses, and show also exactly what will be proved thereby. *N.L.R.B.* v. *Southern Bleachery & Print Works, Inc., supra,* 257 F. 2d at 241 (C.A. 4); *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co.,* 122 F. 2d 433, 442 (C.A. 5).[13] Respondent's

[13] See *Brown* v. *Stapleton*, 216 Ind. 387, 24 N.E. 2d 909, 911–912; *Pearce* v. *Coogle, et al.*, 297 Ky. 194, 178 S.W. 2d 938, 939; *Thompson* v. *Shutz*, 309 Ky. 253, 217 S.W. 2d 315, 319; *Hake* v. *Youngs, et ux.*, 254 Mich. 545, 236 N.W. 858, 859; *Yeoman* v. *Kansas City*, 18 S.W. 2d 107, 109; *Clark* v. *Brown*,

motion fails to conform to these requirements. Respondent submitted no affidavits or otherwise specified what testimony it hoped to adduce. The motion merely states respondent's intention to "take the depositions" of the secretary of the National Association of State Racing Commissioners, and officers of various racetracks around the country. No showing is made of how the testimony will aid respondent's claim, nor is there any indication of exactly what respondent hopes to show, beyond the general statement that "the Board's assertion of jurisdiction over the gaming industry * * * is prejudicial * * *" (R. 88). In light of the foregoing, we submit that respondent's motion was properly denied by the Board.

II. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting unit employees from receiving tokes

The stage technicians' unanimous selection of the Union as their exclusive bargaining representative in the election of October 14, 1963, climaxed an organizing drive marked by respondent's unfair labor practices. The hostility to the Union evident before the election was now transformed into resentment and vindictiveness toward the stage crew responsible

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234 S.W. 2d 1013, 1014; E ——— v. G ———, 317 S.W. 2d 462, 469; *Walsh* v. *Butte, A & P Ry. Co.*, 109 Mont. 456, 97 P. 2d 325, 326; *Sheltra* v. *O'Rourke*, 51 R.I. 392, 155 Atl. 401, 402; *Schiano* v. *McCarthy Freight System, Inc.*, 65 A. 2d 462, 467; *Acer Realty Co.* v. *Comm. of Internal Revenue*, 132 F. 2d 512, 518 (C.A. 8); *Gorrien* v. *Jamison, et al.*, 200 Pac. 2d 488, 492. See also, *N.L.R.B.* v. *J. R. Simplot Co.*, 322 F. 2d 170, 172 (C.A. 9); *N.L.R.B.* v. *Parkhurst Mfg. Co., Inc.*, 317 F. 2d 513, 519 (C.A. 8).

or the Union's victory. Thus, on the day after the lection, Robert Brigham, respondent's director of ndustrial relations, told a group of stage technicians hat he did not like being "made a fool of," and "it nay take me six to eight months to get even, but will." Two days later, after first apologizing for is earlier statement, he said, "I am a vindictive nan, and, believe me, what I said still goes. Within ix to eight months this crew will be reduced 30 to 0 percent." At about the same time Robert Vincent, irector of entertainment, told stage technician Love-ady that respondent "would have done anything" to ave defeated the Union, including firing Producer Barkow, Stage Manager Lein, and Chief Lighting Technician Vogt. Vincent later told stage technician Walker that his chances for a position with manage-ient were "washed up." [14]

[14] As indicated in the Statement of Facts, the Trial Examiner ranted the motion of counsel for the General Counsel and ook judicial notice of these and other relevant facts litigated nd found in the first *Harrah's Club* case. Before the Board, espondent asserted that it was prejudicial error for the Ex-miner to accept as fact those findings in the earlier case, nd that counsel for the General Counsel should have been equired to prove those facts anew. Under the doctrine of ollateral estoppel, however, the Examiner's action was correct. * * * [M]atters which were actually litigated and determined n the first proceeding cannot later be relitigated. Once a party as fought out a matter in litigation with the other party, e cannot later renew that duel." *Commissioner* v. *Sunnen*, 33 U.S. 591, 598. See also *Developments in the Law-Res udicata*, 65 Harv. L. Rev. 818, 840 (1952). The Company's eliance on Section 7(d) of the Administrative Procedure ct (recently recodified as 5 U.S.C. § 556(e)) is without merit. he second sentence thereof states: "When an agency decision ests on official notice of a material fact not appearing in

Then, on December 23, 1963, a few weeks after the Regional Director issued his report recommending dismissal of respondent's objections to the election, the Company posted a notice prohibiting the stage technicians from accepting tokes from performers. Most performers tipped the stage technicians, in amounts ranging from $20 to $100 (Tr. 78, 162–164). During the course of a year a technician usually received from $300 to $600 in tokes—a not insubstantial sum (Tr. 78, 162, GCX 12). In addition to money, technicians occasionally received other items of value, such as wallets, key chains, cuff links and liquor. (Tr. 162–163). These gifts, too, were barred by the rule. Significantly, none of respondent's employees outside this bargaining unit who customarily received tokes, such as the wardrobe mistress, dealers, bartenders, waiters and waitresses, were forbidden by this notice to receive them (Tr. 78–81, 187, 253–254, 270–271, 935–936).

In view of the Company's previously declared intention to take reprisals against the technicians for voting for the Union, and in view of the fact that this

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the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Assuming that provision applies here, there is nothing in the record to show that the Company made a request "to show the contrary." In any event, Section 7(d) is inapplicable because it was not intended to alter or modify the body of judicial rules encompassed under the term *res judicata*. As stated in *Attorney General's Manual on the Administrative Procedure Act*, pp. 79–80 (G.P.O., 1947), this provision was simply intended to broaden the area of matters of which administrative agencies could take judicial notice, thus avoiding "laborious proof of what is obvious and notorious."

was the only group of employees singled out at this time for such action, the Board reasonably inferred that the prohibition against tokes was motivated by the Company's desire to punish the stage technicians for choosing to organize themselves.

Before the Board, respondent sought to justify its conduct by saying that the notice simply reiterated a policy against tokes for stage technicians which long antedated the advent of the Union. The Company asserted that such a policy had been expressed in its employee handbook "You and Your Job". It also pointed to the fact that it had expressly forbidden its chauffeurs to receive tokes in October 1962 (RX 42), and that toking was discouraged in the purchasing and advertising departments because of possible conflicts of interest (Tr. 766–768, 776–778, 967–968).

The Company's reliance on its handbook is unavailing. The edition in effect at the time the notice was posted stated with respect to tokes (RX 32, pp. 19–20):

> If you maintain Harrah's high standards of sincere friendliness, courtesy and cheerfulness, you will find that a number of customers will appreciate your attitude to the extent that you will be offered a gratuity, tip or "toke". These are acceptable and we are pleased to see you receive them if offered under the above circumstances.
>
> However, the Club will not tolerate any hints, suggestions or conniving by any employee that a tip is required or expected for any service. No favoritism or unusual attention is to be shown any customer with the expectation of receiving a tip.

It is readily apparent that nothing in the above-quoted language can reasonably be read to prohibit stage technicians from receiving tokes from performers. The handbook is simply silent on the point. This conclusion is buttressed by the fact that in a new edition of the handbook published in 1964, *after* the notice prohibiting the technicians from accepting tokes was posted, the following paragraph was added to the section on tipping (RX 33, pp. 24–25):

> When a service is performed not for a customer but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such service, no toke may be accepted by the employee for performing such service.

If respondent actually believed that the earlier edition of the handbook expressed a rule against stage technicians accepting tokes from performers, it would not have added this paragraph to make the point again.

The fact that employees in some other departments were barred from accepting tokes does not warrant a finding that a similar policy existed for the stage technicians. Indeed, Patrick France, vice president of public relations, admitted that, while there was a rule against purchasing and advertising department employees accepting tokes from persons with whom they did business, there was no such rule for stage technicians until the notice was posted in December 1963 (Tr. 970–971, 1024–1025). And finally, the absence of a no-toking rule for stage technicians is conclusively established by the undisputed fact, shown

supra, p. 9, that respondent's supervisors knew of the performers' practice to toke the technicians, and generally were the ones who handed out the money on the performers' behalf.

The Company also claimed before the Board that it posted the "no toking" rule in December 1963 because there had been some dissension and bad feeling among the stage technicians in December 1962 when they learned that Stage Manager Lein had been given $800 at the close of a show and he had not distributed any of it to the crew (R. 52; Tr. 693–694, 753–754, 784, 1442–1444, GCX 12). The record shows, however, that while company officials did not learn of this incident until October or November 1963 (R. 52; Tr. 753), they did not post the notice until the end of December. No explanation was offered for the delay in posting the notice. Moreover, there is no showing that there was still unrest among the technicians when respondent finally learned of the incident. Robert Brigham, director of industrial relations, testified that he asked "a couple of the crew members about it," and that they "told [him] so little [he] didn't press the investigation" (R. 52; Tr. 754). Nor did Company officials explain why they felt Lein's receipt of the $800 made it necessary for them to post the "no toking" rule. France testified at the hearing that the money was not intended by the donor as tokes for the crew, but was payment to Lein personally for extra work he had performed for that show (R. 52; Tr. 1040, 1063–1064). Thus, any discontent and unrest among the stage technicians could have been dissipated by the

simple expedient of telling them that the money had not been for them, but for Lein alone.

The strained and contrived nature of the explanations offered by the Company, described above, only serves to confirm the reasonableness of the Board's conclusion "that the notice of December 23, 1963, to stage technicians regarding tokes and Respondent's action in thereafter prohibiting these employees from receiving them from performers was caused by and in retribution for their union activities" (R. 52). Such discriminatory conduct violates Section 8(a) (3) and (1) of the Act. *N.L.R.B.* v. *My Store, Inc.,* 345 F. 2d 494 (C.A. 7) cert. denied, 382 U.S. 927; *N.L.R.B.* v. *Zelrich Co.,* 344 F. 2d 1011, 1013–1014 (C.A. 5); *N.L.R.B.* v. *Citizens Hotel Co.,* 326 F. 2d 501, 504–505 (C.A. 5); *N.L.R.B.* v. *Toffenetti Restaurant Co., Inc.,* 311 F. 2d 219, 220 (C.A. 2) cert. denied, 372 U.S. 977; *Standard Generator Service Co.* v. *N.L.R.B.,* 186 F. 2d 606, 607–608 (C.A. 8).

The Company's conduct also violated Section 8(a) (5) and (1) of the Act because the "no-toking" rule was promulgated unilaterally and without consulting with the bargaining representative chosen by the employees. The receipt of tokes was a mandatory subject of bargaining because it was an emolument of value accruing to the stage technicians by reason of their employment, and which respondent had the power to permit or prohibit. *N.L.R.B.* v. *Central Illinois Public Service Co.,* 324 F. 2d 916, 919 (C.A. 7). See also, *N.L.R.B.* v. *Wonder State Mfg. Co.,* 344 F. 2d 210, 213 (C.A. 8); *N.L.R.B.* v. *Zelrich Co., supra,* 344 F. 2d at 1013–1014; *N.L.R.B.* v. *United States Air*

Conditioning Corp., 336 F. 2d 275, 277 (C.A. 6); *N.L.R.B.* v. *Electric Steam Radiator Corp.,* 321 F. 2d 733, 736–737 (C.A. 6). Thus, the Company had an affirmative obligation to bargain with the Union before instituting the change. *N.L.R.B.* v. *Zelrich, supra* at 1014–1015; *N.L.R.B.* v. *Exchange Parts Co.,* 339 F. 2d 829, 831 (C.A. 5); *N.L.R.B.* v. *Citizens Hotel Co., supra,* 326 F. 2d at 502–504; *N.L.R.B.* v. *Toffenetti Restaurant Co., Inc., supra,* 311 F. 2d at 220; *Standard Generator Service Co.* v. *N.L.R.B., supra,* 186 F. 2d at 607–608.

III. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a)(3) and (1) of the Act by laying off Cole and Lovelady because of their Union activities

Prior to the representation election on October 14, 1963, it was respondent's practice to keep all the stage technicians on the payroll all the time, even though they might not all be needed during a particular period of time (*supra,* p. 10, n. 10). During the slow periods, the Company used the excess manpower available to perform necessary maintenance and repair work on the stage and related equipment (*ibid.*).

During the pre-election campaign, however, no point was more clearly made to the technicians than that this practice would change if the Union won the election. On September 9, Stage Manager Lein told Lovelady that the stage technicians "would probably not all be kept on" if the Union got in. The same day, Producer Barkow told another technician that "the stage crew will be cut back because of the union activity." As we have already shown, *supra,* pp. 6–7 and

18–19, respondent's predictions became more specific following the election. On October 16, two days after the ballots had been counted, Robert Brigham, respondent's director of industrial relations, cautioned the employees that he was a "vindictive man" and that "within six to eight months this crew will be reduced 30 to 50 percent." [15]

Three months later, on January 16, 1964, stage technician Allan Cole was laid off by Barkow and Vincent while a show was in the middle of its run. The reason given for the layoff was that the number of stage technicians was being reduced as part of a club-wide reduction in force, and that Cole, as the lowest in seniority, was to be the first to go. He was also told that he would be recalled if needed. A week later, Cole was recalled for one day to help with the preparation for a new show, and on February 7, he was recalled again, working until his final layoff.

On February 27, the Board issued its decision overruling the Company's objections to the election and

[15] As shown in more detail in the prior case against respondent, the employees had been warned that if the Union came in, not all of the technicians would be kept on all the time, but that the size of the staff would vary according to the needs of each particular show as those needs were determined by management. *Harrah's Club*, 150 NLRB 1702, 1706, 1707, 1714. Prior to the election, the Company had even posted a notice telling the employees that several years before, the Union had "recommended that Harrah's reduce the size of its permanent crew;" that "under an IATSE contract, it would be possible to end up with a basic crew of only *three* men;" and that "whenever any other help is needed, the IATSE contracts dictate that the employer call the 'Hall' and put in a requisition" (150 NLRB at 1710, n. 16, italics in the original).

certifying the Union as the stage technicians' collective bargaining representative.

On March 5, at a time when the stage crew was building scenery to be used in a forthcoming show and there had not yet been an opportunity to rehearse with it, Cole was laid off for the last time. Within a matter of hours, Bruce Lovelady, the assistant stage manager, was also laid off by Barkow for the asserted reason that "we are having a Club-wide cutback and since you are the low man in seniority, you are the next man to go" (*supra,* pp. 12–13).[16] Barkow assured Lovelady that the layoff had "absolutely nothing to do with [his] Union activities" or with the quality of his work, and that if it turned out that more crew members would be needed for the forthcoming show, he would be called back (*ibid.*).

[16] Respondent claimed before the Board that Lovelady was a supervisor within the meaning of Section 2(11) of the Act. Lovelady was designated "assistant stage manager", but the record shows that this position was not a supervisory one. Thus, although Lovelady occasionally directed other employees in performing work, all stagehands on occasion directed the others, including Lovelady (Tr. 50–52, 145, 201–203, 237–238, 293). He acquired no extra duties when Lein announced he was assistant stage manager (Tr. 134). Lovelady was paid on the same basis as the other technicians, and received less pay than employee Ponts (Tr. 52). He had no authority to hire, transfer, suspend, layoff, recall, promote, discharge or recommend the discipline of other employees (Tr. 112–113). Lovelady prepared "cue sheets", which list scenery and prop movements necessary for the particular show, but the stage manager always had the responsibility of deciding whether the cues listed would be carried out (Tr. 137–139). The days-off schedule prepared by Lovelady was always submitted as a recommendation to the stage manager; the latter made the final

Respondent's openly expressed hostility toward the Union and its announced intention to reduce the size of the staff because the Union had been voted in, presents a *prima facie* case of illegal discrimination violative of Section 8(a) (3) and (1) of the Act when, just as threatened, a reduction in force was effected three to six months later. This conclusion is buttressed by the fact that respondent had already discriminatorily discharged the employee, Wetherill, who had presented the Union's recognition demand and filed the

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decisions and frequently made changes in the schedule before posting it in final form (Tr. 139). If there was a discipline problem while the stage manager was absent Lovelady was not allowed to do anything about it—he merely reported it to his supervisors (Tr. 136). Even when the stage manager was on vacation, Lovelady might do his routine physical work but clearly was not invested with managerial discretion (Tr. 119). Indeed, Company officials specifically told Lovelady that he was not a supervisor and could not sign time slips (Tr. 119–120). Moreover, respondent itself included Lovelady's name in a list which included employeees only and excluded all the admitted supervisors. See RX 34G. It is well settled that in these circumstances Lovelady cannot be classified as a supervisor. *N.L.R.B.* v. *Lindsay Newspapers, Inc.*, 315 F. 2d 709, 712 (C.A. 5) [sporadic exercise of supervisory authority does not turn an employee into a supervisor]; *N.L.R.B.* v. *Merchants Police, Inc.*, 313 F. 2d 310, 312 (C.A. 7) [must have power of supervision requiring the use of independent judgment to be a supervisor; reporting of dereliction of duty does not make one a supervisor]; *Precision Fabricators, Inc.* v. *N.L.R.B.*, 204 F. 2d 567, 568–569 (C.A. 2) [assignment of work to others from a list received from superior does not make one a supervisor]; *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 279 (C.A. 5) [employer cannot make one a supervisor by new title]; *N.L.R.B.* v. *City Yellow Cab Co., et al.*, 344 F. 2d 575, 580–581 (C.A. 6) ["The responsibility of making assignments in a routine fashion does not transform an employee into a supervisor"].

representation petition,[17] and it had reason to believe that Cole and Lovelady were also strong Union adherents. Thus, Cole had been the Union's observer at the election, prompting the then stage manager, Sy Lein, to remark, "Didn't I tell you Allan Cole * * * was one of the ringleaders?" (*supra,* p. 5); and Lovelady had attended the pre-election conference at the Board's Regional Office, after which Lein had told him that respondent considered him to be "on the Union's side" (*supra,* pp. 4–5).

Moreover, Barkow's defensive denial that Lovelady's union activities had anything to do with his layoff, warrants the inference that the opposite is the case, since it stands in patent contradiction to management's many threats to take just such retaliatory action if the employees voted the Union in. Barkow's assurance that Lovelady's layoff was not because of bad work raises a matter which further undercuts the credibility of the Company's justification for its action. For, Lovelady was considered by respondent to be the best stage technician it had. He had the title of assistant stage manager, and had been one of only two unit employees to receive year-end merit bonus checks just two months before (R. 53, 57; Tr. 73–75).[18]

[17] See *Harrah's Club*, *supra*, 150 NLRB at 1720–1727, enf'd. 362 F. 2d at 428–430. There, too, respondent sought to justify the discharge on the ground that one man had to be let go, and Wetherill had the least seniority.

[18] The other employee was Paul Jordan, who by the end of 1963 had been transferred out of the stage technician unit and made lounge manager (R. 53, 57; Tr. 74). When other unit employees complained about not getting a bonus, Entertainment Director Vincent offered to give one to any other stage tech-

In light of this fact, Lovelady's layoff simply for the asserted reason that he was "the low man in seniority" constitutes additional evidence that the layoff was discriminatorily motivated. The record shows that, for purposes of layoff, it was respondent's normal policy to give weight not only to seniority, but also to the Company's needs and the men's experience, skills and general employment record (Tr. 72–73, 995–996, 998–999). Under this test, it is hard to believe that Lovelady would have been selected for layoff. The inference is plainly warranted, therefore, that respondent's deviation from its normal practice by mechanically applying a seniority test with respect to Lovelady and Cole was motivated by a desire to gain retribution against two employees because of their support of the Union.

Before the Board, respondent sought to prove that the layoffs of Lovelady and Cole were unrelated to the unionization of its stage technicians, but in fact were part of its continuing efforts to keep costs down. The Board concluded that this reason was pretextual, and we submit that the record bears out that conclusion.

Brigham, the man who threatened the employees with a retaliatory reduction in force, testified that Cole was laid off in January "because of better supervision and better arrangements of work and better organizing of the whole procedure in the stage crew" (Tr. 708; see also Tr. 714). He further testified that

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nician who was qualified to perform the various functions that Lovelady performed and could do them as well (R. 53; Tr. 75). While the names of other employees were suggested, none were found by management to come up to the standard set (*ibid.*).

the layoffs of Cole and Lovelady in March were for the same reasons, "plus the fact that the nature of the productions were simplified in an effort at economy" (*ibid.*).

The explanation offered for the January layoff hardly rings true, for Cole was laid off in the middle of a show's run, and he was recalled twice thereafter for more than four weeks' work before his final layoff in March. That the March layoffs were not due to lack of work is evidenced by the fact that after the layoffs, the supervisors pulled cues and performed other technicians' work to an extent far greater than they had to do before (Tr. 241, 242, 245–246, 297, 405–406). Barkow also admitted to Lovelady at the time that he did not know if he could run the next show without him and Cole (Tr. 66–68). Moreover, it does not appear in what way the supervision had become "better" beginning in the middle of January. Barkow had been doubling as both producer and stage manager since stage manager Lein was discharged in November (Tr. 10043–10045). During this period of time, the remaining stage crew supervisors could hardly have been so efficient that respondent could also afford to be without the services of the assistant stage manager. That such an arrangement *was* unsatisfactory is attested by the fact that a new stage manager, Bushousen, was hired the following August (Tr. 957, 10044–10045). In view of the inconsistencies and contradictions involved in Brigham's testimony, the Board properly declined to give it any credence.

A slightly different explanation for the March layoffs was offered by France, the vice president in

charge of entertainment, publicity, special events and advertising. He testified that he ordered the Entertainment Department to simplify its productions in order to cut costs, and that he insisted that Barkow and Vincent "start now" instead of waiting for the next show, as they had requested (Tr. 994). Since, at that time, the performers were already contracted for [19] and the props had already been built, it is apparent that the only avenue for cutting costs at that point was to lay off members of the crew. France knew that this would be the consequence of his directive, for Barkow and Vincent so advised him (Tr. 994–995).

Coming as it did just a few days after the Union's certification, it is a fair inference that France's order was discriminatorily motivated. France was openly opposed to the Union, and had made threats of reprisals and promises of benefits to some of the employees in an attempt to keep the Union out (*supra,* p. 8). Moreover, the most costly element in respondent's shows is the entertainers (Tr. 992). Since the latter part of 1962, respondent had been economizing in that sector by reducing the number of acts and getting less expensive entertainers (Tr. 947–950, 979–981, 986–987). In addition, respondent had long since adopted the practice of using fewer props (Tr. 952, 986). Until the layoff of Cole in January 1964, however, the only reduction in the number of full time stage technicians occurred when Paul Jordan was transferred to the position of lounge manager in November 1963 (R. 58; Tr. 976–977, 988, 1028). That

[19] Such contracts are entered into 6 to 12 months in advance (Tr. 608, 946, 1037).

reduced the complement of employees from 11 to 10 (R. 58). At about the same time, Stage Manager Sy Lein was also terminated, further reducing the size of the staff (*ibid.*). In light of all the foregoing, France's insistence in early March that the staff be reduced even more, when the savings would be minimal and the increased burdens on the remaining crew members great, warrants the finding that "the layoffs stemmed from Respondent's strong opposition to the union activities of the stage technicians, and that the economy program was used as a pretext to accomplish these acts" (R. 57). It is reasonable to believe, as the Trial Examiner observed, that "*if* any further reductions would have occurred, absent the union activities of the stage technicians, they would have been accomplished by attrition, or by the reassignment of stage technicians to other positions" (R. 58).[20]

In sum, respondent's declared hostility to the Union, its announced declaration of retaliatory intent, and the timing of the discharges, all furnish ample support for the Board's finding that Cole and Lovelady were discharged for their union activity. *N.L.R.B.* v. *Harrah's Club,* 362 F. 2d 425, 428–430 (C.A. 9), cert. denied, 386 U.S. 915; *Shattuck Denn Mining Corp.* v. *N.L.R.B.,* 362 F. 2d 466, 470 (C.A. 9); *N.L.R.B.* v. *Victory Plating Works, Inc.,* 325 F. 2d 92, 93 (C.A. 9); *N.L.R.B.* v. *Idaho Potato Processors, Inc.,* 322 F. 2d 573, 575 (C.A. 9). While respondent may in fact have

[20] The record shows that when other departments suffered a reduction in force, respondent made an effort to find other positions for meritorious employees and frequently effected the reduction simply by not replacing employees who voluntarily quit (R. 56; Tr. 599–600, 897–898, 978, 1139).

saved money as a result of the discharges, "this success proves only that [respondent] realized an economic benefit from its anti-union activity," not that the discharges were motivated solely by the economy program. *N.L.R.B.* v. *Biscayne Television Corp.,* 337 F. 2d 267, 268 (C.A. 5). If the discharges were in part motivated by union activities, they fall within the proscription of Section 8(a) (3) and (1) of the Act. *N.L.R.B.* v. *Security Plating Co., Inc.,* 356 F. 2d 725, 727–728 (C.A. 9); *N.L.R.B.* v. *Mrak Coal Co., Inc.,* 322 F. 2d 311, 312–313 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Co.,* 232 F. 2d 447, 450 (C.A. 9); *N.L.R.B.* v. *Wells, Inc.,* 162 F. 2d 457, 460 (C.A. 9). As we have demonstrated, such was the case here.

IV. The Board properly ordered respondent to offer reinstatement and backpay to Lovelady and Cole

After several offers of short-term work, respondent, on June 26, offered Lovelady employment, stating that a "full-time position" had opened and asking him to report by June 30 at the latest. Lovelady rejected this offer because it made no mention of unconditional reinstatement or backpay. Similarly, respondent twice offered Cole temporary employment and then, on July 1, wired him that a "full-time position" had opened on the stage crew and asked him to report by July 5 at the latest. Cole declined because the short notice did not give him time to move back to Tahoe, and said he "would need at least four weeks to prepare" (*supra,* p. 12).

The Trial Examiner found that while neither offer of reinstatement gave Cole and Lovelady a reasonable

period of time within which to report, the discriminatees' failure to "ask for or indicate that he would accept employment in a reasonable period" constituted a rejection of respondent's offer and denied an order directing respondent to reinstate these employees (R. 47, 48, nn. 3 and 5). The Board reversed the Examiner on the reinstatement issue, holding (R. 85, n. 1):

> Unlike the Trial Examiner, * * * we do not consider Cole's and Lovelady's failure to request a reasonable extension of the reporting time as evidence that the proposed reporting dates did not influence their rejection of these offers because, in our opinion such a holding places an undue and unwarranted burden upon the discriminatee to make a counterproposal to Respondent's offer. The reinstatement obligation properly rests with Respondent and is satisfied only by a valid and unconditional offer of reinstatement. As we here conclude that Respondent's offers to Cole and Lovelady did not satisfy this obligation, we shall make provision for their reinstatement in our Order.

The Board's holding is clearly correct. It is well-settled that an offer of reinstatement which imposes unreasonable conditions upon the discriminatee is not valid. For example, where the offer requires that the employee work at a different and distant company facility (*N.L.R.B.* v. *Quest-Shon Mark Brassiere Co.,* 185 F. 2d 285, 290 (C.A. 2), cert. denied, 342 U.S. 812), or requires that the employee withdraw a previously filed unfair labor practice charge (*N.L.R.B.* v. *Kanmak Mills, Inc.,* 200 F. 2d 542, 544

(C.A. 3)), or would prevent the employee from testifying at a forthcoming hearing on unfair labor practice charges (*Mundet Cork Corp.*, 96 NLRB 1142, 1150–1151), it is not a valid offer of reinstatement. Similarly, where the offer imposes on unreasonably short reporting time upon the employee, it is invalid. *Fred E. Nelson, etc.*, 102 NLRB 780, 783, enforced, 208 F. 2d 230 (C.A. 3); *Thermoid Co.*, 90 NLRB 614, 615–616. Thus, the Board properly held that the offers of reinstatement here were invalid and ordered respondent to offer reinstatement to Cole and Lovelady. In not requiring that Cole and Lovelady propose alternate reporting dates the Board reasonably exercised its discretion to fashion remedies which effectuate the policies of the Act. See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197–200; *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 555 (C.A. 9). As the Board noted, to impose upon the discriminatees the burden of making a counter-proposal would allow respondent to shift an obligation which properly rests with the party responsible for the discrimination.

V. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the employees' exclusive bargaining representative

On February 27, 1964, the Board certified the Union as the employees' exclusive bargaining representative (GCX 2(g)). Two days later, the Union requested that respondent bargain with it pursuant to the certification, but respondent refused (GCX 1(g), paragraphs VII and VIII). Before the Board

the Company argued that the Union's certification was invalid because a post-election hearing should have been ordered to examine alleged union interference with the election. The contention is without merit.

Though Section 9(c)(1) of the Act (with exceptions not here relevant) affords the parties the right to a preelection hearing,[21] no such right exists regarding a post-election hearing. Under the Board's rules,[22] a post-election hearing is conducted only where "substantial and material factual issues exist which can be resolved only after a hearing." This practice has been uniformly approved by the Courts of Appeals. *N.L.R.B.* v. *Bata Shoe Co., Inc.*, 377 F. 2d 821 (C.A. 4); *N.L.R.B.* v. *J. R. Simplot Co.*, 322 F. 2d 170, 172 (C.A. 9); *N.L.R.B.* v. *Clearfield Cheese Co.*, 322 F. 2d 89, 93 (C.A. 3); *N.L.R.B.* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 76 (C.A. 5); *N.L.R.B.* v. *Air Control Products*, 335 F. 2d 245, 249 (C.A. 5); *N.L.R.B.* v. *J. J. Collins Sons*, 332 F. 2d 523, 524 (C.A. 7); *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F. 2d 199, 204–206 (C.A. 7). The policy of avoiding lengthy and unnecessary hearings comports with the implicit statutory requirement that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved." *N.L.R.B.* v. *O.K. Van Storage, Inc., supra*, 297 F. 2d at 96 (C.A. 5). As pointed out in *N.L.R.B.* v. *Joclin*

[21] The parties here waived their right to a preelection hearing by executing the Stipulation for Certification Upon Consent Election (GCX 2(b)). See Section 9(c)(4) of the Act, *N.L.R.B.* v. *Carlton Wood Products*, 201 F. 2d 863, 866–867 (C.A. 9).

[22] Section 102.69(b), 29 C.F.R. § 102.69(b).

Mfg. Co., 314 F. 2d 627, 632 (C.A. 2), the Board's policy of "conditioning the right to a hearing on a showing that factual issues are 'substantial and material' [is] a requirement not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns * * *." Thus, where the party seeking to overturn a representation determination fails to raise substantial and material issues of fact, it "has no cause for complaint when and if [its] demand for a hearing is denied." *N.L.R.B.* v. *O.K. Van Storage, Inc., supra,* 297 F. 2d at 76. As we show below, respondent raised no factual issues which required a hearing.

In its objections to the election respondent alleged that the Union:

(1) induced employees to vote for it by promising them

(a) backpay allegedly due;

(b) jobs in other areas;

(c) it would prevent respondent from using less than 12 men on the stage crew;

(2) threatened to blacklist employees if they did not vote for the Union; and

(3) waived its rules and permitted the employees to join the Union on the condition that they vote for the Union.

In support of objection 1(a) respondent offered the affidavits of Robert Brigham and Justus L. Morrow. Morrow recounted a conversation with technician Larry Helderbrand, during which, according to Morrow, "Helderbrand said that 'if we go union we will get all of our back overtime pay' * * *. Helderbrand

did say that 'the union guaranteed' the foregoing 'if we go union.' He didn't say who in the union told him this" (RX 52H; RX 1(a)). Brigham's affidavit tells of a conversation he had with Morrow during which Morrow repeated the substance of what Helderbrand allegedly said (RX 1(f)).

It is readily apparent that Morrow's statement offers no direct evidence of union interference with the employees' freedom of choice. It is at best hearsay, and moreover is absolutely contradicted by the affidavit of Helderbrand himself. Thus, Helderbrand swore,

> At no time did I tell Chuck Morrow, or anybody else, that if the union was voted in, I would collect backpay for overtime. I did say that if the union got in we would get the pay that was coming to us. I definitely never mentioned in any way to Morrow anything about any overtime pay.
>
> At no time have I ever been told or promised the above by any union representative (RX 52 C).

The test of a valid election is whether there was conduct which made it impossible for the employees to register a free and untrammeled choice for or against a bargaining representative (*General Shoe Corp.,* 77 NLRB 124, 126). Since there is no direct evidence that the employees were subject to such conduct by the Union, and since there is direct evidence that they were not, the Board properly held that objection 1(a) raised no substantial and material issue of fact where based upon directly refuted hearsay. *N.L.R.B.* v. *Atkinson Dredging Co.,* 329 F.

2d 158, 164 (C.A. 4) cert denied, 377 U.S. 965; *N.L.R.B.* v. *O.K. Van Storage, Inc., supra,* 297 F. 2d at 76 (C.A. 5).

Objection 1(b) was based on the affidavits of Justus Morrow and Morton King. Morrow reported that Helderbrand said the "union guaranteed" jobs elsewhere to men who lost their jobs at Harrah's (RX 52 H, RX 1(a)), but again this allegation was directly denied by Helderbrand's sworn statement—"At no time have I ever told Morrow that the union guaranteed us, or me, a job anywhere if we got laid off or fired at Harrah's. The union, and none of its representatives, has never made any such guarantee to me" (RX 52 C). King's affidavit reports that technician Jordan once said, "'* * * well, if anything happens to us here, we've got a job in Vegas'" (RX 1(c)). King states that Jordan did not say he had been promised a job by the Union, but King nevertheless "derived the definite impression" that such a promise had been made. Jordan clearly stated in his affidavit that he was never told that the Union would get or guarantee him a job elsewhere. They were only told that if they "wanted or had to leave Harrah's" that "there was work available in Las Vegas" (RX 52 E). The absence of a promise on the part of the Union to secure jobs for the technicians elsewhere was confirmed in affidavits made by Allan Cole (RX 52 B), Helderbrand (RX 52 C), Tony Himinez (RX 52 D), Lovelady (RX 52 H), Richard Ponts (RX 52 J), and Robert Wetherill (RX 52 K). In view of the overwhelming direct evidence that no promise of work elsewhere had been made, the Board properly overruled this

objection. *N.L.R.B.* v. *Atkinson Dredging Co., supra,* 329 F. 2d at 164 (C.A. 4); *N.L.R.B.* v. *O.K. Van Storage, Inc., supra,* 297 F. 2d at 76 (C.A. 5); *Oates Bros., Inc.,* 127 NLRB 1674.

Objection 1(c) is based upon the affidavits of Brigham and Morrow. Morrow claimed that Helderbrand, a few days *after* the election, remarked, "' * * * it is a cinch that none of us will lose our jobs now that the union is voted in' " (RX 52 H). Brigham's affidavit recounts his conversation with Morrow wherein Morrow was said to have stated that he (Morrow) learned from Helderbrand that "the Union would see that the crew was maintained at twelve (12) men" (RX 1(f)). Brigham also said two other stage technicians, whose names he could not recall, made the same statements to him. Robert Stirling's affidavit reports a remark similar to that which Morrow attributes to Helderbrand in his (Morrow's) affidavit. According to Stirling, a week after the election Paul Jordan said that he (Jordan) would not have to worry about being fired—the crew was protected. Jordan, in his affidavit, denied being told that the Union would see to it that the stage crew was not cut if he voted for the Union. The subject was mentioned by the Union only as a topic for negotiation (RX 52 E). Helderbrand also denied ever being told that the Union would guarantee to keep the crew at 12 men (RX 52 C). Here also the absence of such promises on the part of the Union is confirmed by the affidavits of Allan Cole (RX 52 B), Tony Himinez (RX 52 D), Bruce Lovelady (RX 52 G), William Murray (RX 52 I), Richard Ponts (RX 52 J), and Robert Weth-

erill (RX 52 K). It could hardly be contended that respondent's inferences based upon directly refuted hearsay present a substantial and material issue of fact.

The affidavits of Jacques Vogt and Robert Brigham form the basis for objection 2. Vogt described a conversation he had with Allan Cole, wherein Cole remarked that it was difficult to find work as a stagehand without a union card. From this conversation Vogt "inferred rather clearly" that Cole had "derived his view" about the Union from union representatives (RX 1(d)). Brigham reported that Richard Ponts told him that he had to vote for the Union because he could not get a job elsewhere without a union card. Brigham also said that Lovelady had once said that he (Lovelady) was convinced a stagehand could not work elsewhere without a union card. Cole, in his affidavit, recalled telling Vogt that he had voted for the Union because, among other reasons, he thought it was hard to find work elsewhere without belonging to the Union. But, Cole stated, "I did not say or imply in any way that my support of the union or vote for the union was contingent upon my getting an IATSE card" (RX 52 B). Lovelady denied having told Brigham that he was ever told or convinced that he had to have a union card to work elsewhere. "At no time has any IATSE representative told or promised me that if I did not vote for the union I would not be able to get work anywhere in the business or that I would not get an IATSE card" (RX 52 G). Ponts also denied making the statements attributed to him. He said, "I did not say at any time to anybody that I

had to vote for the union because I could not get a job anywhere else in the business without a card" (RX 52 J). Ponts did admit believing that it was very difficult to find work without a union card. The affidavits of other technicians show that the Union never made such threats. RX 52 I, RX 52 G, RX 52 F, RX 52 E, RX 52 D. It is readily apparent that no substantial and material issue of fact was raised by respondent. Here again respondent relies upon inferences drawn from hearsay, which inferences are directly contradicted by the alleged declarants.

The last objection raised by respondent was that the Union waived tests, initiation fees and other entrance requirements conditioned upon the applicants' voting "yes" in the election. Support for the objection is offered in the affidavit of Richard Lusiani (Lane). Lusiani said that Jordan had told him that he (Jordan) had paid $61 for a union card. Jordan, according to Lusiani, said he did not have the card, that Union business representative Robert Wetherill had kept it. Lusiani "drew the inference" that Wetherill was keeping the cards to coerce the employees to vote for the Union (RX 1(e)). Jordan's affidavit explains Lusiani's incorrect inferences. The Union's fees were $100 for initiation, plus 1 year's dues, $36, to be paid in advance. Jordan, at the time of his conversation with Lusiani, had paid the full $36 in dues, as well as $25 toward the $100 initiation fee. The balance was due by the first of January 1964. Jordan also stated that Wetherill was in possession of the card because Jordan had specifically requested him to keep it—Jordan "did not

want to be compromised by having the card * * *" (RX 52 E). Jordan's affidavit indicates that the deferred payment arrangement was not held out as an inducement, and was available to all on an equal basis (RX 52 E). Jordan's statements are borne out by the affidavits of other stagehands. RX 52 B, RX 52 D, RX 52 G, RX 52 I, RX 52 J. It is also clear from the affidavits that the Union never offered to waive tests or other conditions to obtaining membership. RX 52 B, RX 52 D, RX 52 E, RX 52 G, RX 52 I, RX 52 J, RX 52 K. Thus, once more, it is apparent that the Board properly overruled respondent's objection based upon inferences from expressly denied hearsay.

Clearly, in all of its objections, respondent failed to raise a substantial and material issue of fact which warranted a hearing. The Board's certification of the Union was therefore valid, and respondent was obliged to honor that certification and bargain with the Union on behalf of the stage technicians.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in

the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * *

Appendix B

This Appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

General Counsel's exhibits

No. (pages)	Identified	Offered	Received in evidence
a) through 1(p)	4	4	4
a) through 2(g)	12	5	12
	32	33	401
a) through 4(u)	42	42	45
	82	82	84
	85	85	86
	86	86	86
	87	87	87
	467	508	(rejected p. 508)
(a) through 10(e)	468	508	(rejected p. 508)
	915	916	916
	1437	1438	1440

Respondent's exhibits

No.	Identified	Offered	Received in evidence
a) through 1(f)	15	15	(rejected p. 15)
	16	16	(rejected p. 16)
	36		
	47	48	48
	9	100	100
	103	177	178
	104	179	180
	167	167	167
	167	168	168
	168	168	169
	169	169	169
	170	170	170
(a) through 13(b)	349, 398, 701	699	701
	365	366	367
	366	366	367
	384	384	385
(a) through 17(b)	385	386	386
	387	387	394

No.	Identified	Offered	Received in evidence
19	388	389	394
20	389	(not offered)	394
21(a) through 21(b)	390	391	394
22	511	512	512
23	512	(not offered)	513
24	513	514	514
25	514	515	515
26	515	516	516
27	517	517	517
28	517	518	518
29	525	526	526
30	687	687	688
31	688	689	689
32	691	695	696
33	692	695	696
34(a) through 34(g)	714	717	717
35	718	718	718
36(a) through 36(b)	719	720	722
37	722	724	725
37-A	1200	1201	1201
38	726	726	728
38-A	1177	1180	1181
38-B	1562	1562	1562
39	729	730	731
40	844	847	847
41	851	(not offered)	857
42	857	859	859
43	1089	1094	1095
44	1091	1094	1095
45	1092	1094	1095
46	1133	1561	1561
47	1186	1189	1192
47-A	1402	1403	1404
48-A through 48-F	1192	(not offered)	1199
49	1201	1202	1203
50	1203	1204	1205
51	1217	1218	1218
52-A through 52-K	1345	1345	(rejected p. 1345)
53-A	1404	1405	1422
53-B	1563	1562	1563
54	1422	1426	1426
55-A through 55-F	1563	1563	1563
56	1563	1563	1564

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